



shimamura

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wasserott's Medicare Service, Inc.

File: B-230230

Date: May 9, 1988

DIGEST

1. Where a contracting officer failed to provide an incumbent contractor with a small business set-aside solicitation for a follow-on contract based on a belief that the contractor did not meet the applicable size standard and therefore would not be eligible for contract award, the exclusion of the contractor was proper since the Small Business Administration, before bid opening and in response to the contracting officer's request, confirmed that the incumbent does not meet the size standard.
2. General Accounting Office will not consider protest that a solicitation has the wrong Standard Industrial Classification (SIC) code, used to determine the small business size standard for the procurement, since conclusive authority to determine the proper SIC code is vested in the Small Business Administration.
3. A Small Business Administration determination that the awardee does not meet the solicitation size standard, which is rendered for prospective application only, does not affect the validity of the protested contract award.

DECISION

Wasserott's Medicare Service, Inc., the incumbent contractor for home oxygen services, protests the Veterans Administration's (VA) failure to provide the firm with a copy of invitation for bids (IFB) No. 595-1-88 for a follow-on contract, and contract award under the solicitation to Eastern Home Care and Oxygen Co., Inc. The IFB was set aside by the VA Medical Center in Lebanon, Pennsylvania, for small businesses with average annual receipts of less than \$3.5 million for the preceding 3 fiscal years. The

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protester basically contends that the contracting officer improperly excluded Wasserott's from the competition; that the \$3.5 million size standard is inappropriate for the oxygen services contract; and that Eastern, a large business, was ineligible for contract award.

We deny the protest in part and dismiss it in part.

The IFB, synopsized in the August 12, 1987, Commerce Business Daily (CBD), advised potential bidders that standard industrial classification (SIC) 8091 applied, thereby limiting the procurement to small businesses meeting the \$3.5 million size standard. The CBD notice also advised that solicitation packages would be available after August 31.

The VA issued the solicitation on September 1. Wasserott's was not sent a solicitation package because the contracting officer knew of a May 8 Small Business Administration (SBA) determination that Wasserott's was not a small business concern for government procurements having a size standard of \$3.5 million. The May 8 SBA determination was issued pursuant to a protest by Wasserott's of the size standard in a solicitation issued by the VA Medical Center in Wilkes Barre, Pennsylvania, for home oxygen therapy services and maintenance of associated equipment and supplies. On December 2, the SBA confirmed this finding, in response to the VA's October 5 request for a size status determination for the purpose of deciding whether to invite Wasserott's to compete in the instant procurement, stating that the May 8 size determination remained in force because Wasserott's had neither appealed its classification nor requested a recertification.

The VA received four bids in response to the IFB; however, one bid from a large business was rejected. The contract was awarded to Eastern on January 19, 1988, based on its low bid and the firm's certification that it was a small business concern.

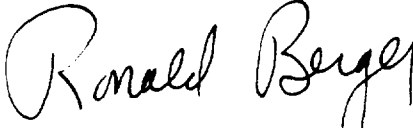
The VA states that if the SBA, in response to the VA's October request for a size determination, had reversed its May 8 finding that Wasserott's was not a small business for procurements with a \$3.5 million size standard, the protester would have been provided with an IFB in sufficient time to prepare and submit a bid. The agency further maintains that competition otherwise was maximized as required because the solicitation was synopsized in the CBD as a small business set-aside and a number of small businesses responded.

We see nothing wrong in the VA's not furnishing Wasserott's a copy of the IFB in these circumstances. Since the SBA confirmed that Wasserott's is not a small business concern for procurements with a \$3.5 million size standard, the firm simply could not have qualified for award of a contract in this procurement. See Dragon Services, Inc., B-228912, Oct. 7, 1987, 87-2 CPD ¶ 344.

Regarding the protest of the IFB's \$3.5 million size standard, the initial determination of the appropriate SIC code is for the contracting officer, with affected firms having the right to appeal to the SBA, whose determination on such matters is conclusive. See Libby Corp., B-229326, Oct. 9, 1987, 87-2 CPD ¶ 351. Consequently, our Office will not consider what SIC code should be included in a small business set-aside. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1988).

With respect to the January 19 award to Eastern, the VA states that although it accepted Eastern's certification that it was a small business, upon receiving a February 3 letter from Wasserott's challenging Eastern's size status, the agency requested the SBA's opinion on the matter for purposes of future procurements. During the consideration of this protest, the SBA issued a determination that Eastern is not a small business concern for procurements having \$3.5 million size standards. The determination, however, is prospective in application and thus does not affect the award of the protested contract. Federal Acquisition Regulation § 19.302 (FAC 84-31). In any case, we note that Wasserott's was not prejudiced by the determination because two other small businesses bid in response to the IFB, and one of them presumably would have received the award if Eastern had not.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel